FILED
DEC 14 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 866

MORRIS DUBIN,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. FREDERIC TAYLOR,
JAMES B. BURKE,
Attorneys for Petitioner.

Of Counsel:
GEORGE HARRIS
FRANK X. O'DONNELL, JR.
BURKE & BURKE

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR WRIT	7
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c

CITATIONS

CASES:

	PAGE
Armstrong v. *United States*, 364 U. S. 40, 49 (1960)	10
Turney v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953)	10
United States v. *Miller*, 317 U. S. 369 (1943)	10

STATUTES:

Espionage Act:

18 U. S. C. § 793(d), (e)	2, 6

Federal Property and Administrative Services Act of 1949:

40 U.S. C. § 471	8
40 U. S. C. § 472 (e)	2, 8
40 U. S. C. § 472 (g)	3, 8
40 U. S.C. § 484 (d)	9

Judiciary and Judicial Procedure, §7:

28 U. S. C. § 1255(1)	1
28 U. S. C. § 1491	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. _____

MORRIS DUBIN,
Petitioner,
against
UNITED STATES,
Respondent.

Morris Dubin petitions for a Writ of Certiorari to review the judgment of the United States Court of Claims entered in this case on July 18, 1966.

Opinions Below

The opinion of the Court of Claims (App. 1a-33a) is reported at 363 F. 2d 938 (Ct. Cl. 1966). A prior opinion of the Court of Claims denying cross motions for summary judgment (App. 1b-6b) is reported at 289 F. 2d 651 (Ct. Cl. 1961).

Jurisdiction

The Judgment of the Court of Claims sought to be reviewed (App. C) was dated and entered July 18, 1966. On October 13, 1966, Mr. CHIEF JUSTICE WARREN signed an order extending petitioner's time for filing a petition for Writ of Certiorari to and including December 15, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1255(1).

Questions Presented

1. Where a citizen innocently purchases surplus property from the Air Force under the provisions of the *Federal Property and Administrative Services Act of 1949*, and thereafter, despite knowledge of the impending sale and failure to object to it, the Navy seizes the goods on the ground they relate to the national defense under the Espionage Act, is the citizen entitled to compensation for the seizure?

2. If the answer to the previous question is in the affirmative, is the citizen's measure of damages limited to his direct out-of-pocket expenditures or may he recover fair value?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "* * * nor shall private property be taken for public use, without just compensation."

Section 793 of *Espionage Act*, added by ch. 645, 62 Stat. 737 (1948) (now 18 U. S. C. § 793(d), (e), 1964)), provides in pertinent part:

> "Whoever, lawfully or unlawfully having possession of, access to, control over, * * * any document * * * instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Section 3(e) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 378 (1949), 40 U. S. C. § 472(e) (1964) provides in pertinent part:

> "The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof."

Section 3(g) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 379 (1949) 40 U. S. C. § 472(g) (1964) provides in pertinent part:

> "The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator."

Section 203(d) of *Federal Property and Administrative Services Act of 1949*, 63 Stat. 385, 386 (1949), 40 U. S. C. 484(d) (1964) provides in pertinent part:

> "A * * * bill of sale, * * * executed by or in behalf of any executive agency purporting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title * * * of any bona fide * * * transferee for value and without notice of lack of such compliance."

Statement

In July, 1950, petitioner, Morris Dubin, who formerly operated a small grocery store, made his first purchase of government surplus property. Acting pursuant to a public invitation to bid issued by the United States Air Force, he purchased a large lot of surplus electronic equipment from the Air Force at a public sale held at an Air Force Depot at Dayton, Ohio. (App. 2a; Fn.* 10, App. 13a)

Prior to bidding on the equipment, petitioner and other private bidders were permitted freely to examine it. (Fn. 7; App. 12a) It was obvious to petitioner and everyone else that this was military equipment, as were the huge

---

* "Fn." refers to findings of Court of Claims.

mounds of other equipments offered for sale at the same time at the Air Force Depot. There were no markings on the goods, or on the boxes in which most of them were packed, indicating that any of the goods had a then present relationship to the National Defense, (Fn. 8; App. 12a) and there was nothing in the circumstances of the sale or otherwise to warn the petitioner that two of the types of radar equipment he purchased had been, respectively, radar components of the Bat and Pelican missiles, and that their possession could trigger criminal consequences under the *Espionage Act.*

Petitioner received a bill of sale for the equipment signed by the Air Force contracting officer stating that the contract was authorized by Public Law 152-81st Congress. (Fn. 10(a); App. 13a)

The contract also included a clause as follows:

> "Article 14. *Use warranty.*—The purchaser represents and warrants that it will use or consume the property covered hereby in the United States for manufacturing, construction, maintenance, or repair purposes, and the purchaser agrees that if it does not use or consume any of the items, it will not resell them at a profit."

The Bat and Pelican were missiles developed by the Navy early in World War II. Before it offered these radar components for public sale as surplus property, the Air Force, of course, notified the Navy that they were to be sold, and the Navy expressed no need for the equipments and made no objection to their sale as surplus. (Fn. 6; App. 11a)

During the course of the Air Force sale, petitioner learned that one Sellatti owned certain power supply units which were accessories for one of the types of radar equipment which he had purchased at the Air Force sale. Petitioner purchased these accessory power supplies from Sellatti. (Fn. 13; App. 14a) Thereafter, petitioner learned

that another private company had certain dynamotor power units which were accessories to a second type of radar which he had purchased from the Air Force. Petitioner purchased one of the latter dynamotor power units under an arrangement allowing him to purchase additional power units for each of his second type of radar sets. (Fn. 14; App. 14a)

Petitioner then prepared a brochure describing and picturing these equipments, among other radar and electronic equipment which he offered for sale at retail, and listed retail prices for each. (App. 3a 4a)

After some 11,000 of these brochures had been mailed to potential customers, on August 16, 1960, officers of the United States Navy announced to petitioner that he had to stop mailing these brochures and could not sell the equipment because two of the types advertised (which he had purchased from the Air Force) and their associated power supplies (purchased from two different private parties), related to the National Defense under the *Espionage Act.* (App. 4a)

This was the first time the petitioner learned of any claim by anyone that any of these goods related to the National Defense or that anyone objected to their resale. (Fn. 18; App. 16a)

The Navy thereupon seized the equipments from the petitioner, but signed receipts for them acknowledging petitioner's right to just compensation. (App. 4a)

In 1955, petitioner instituted this action in the Court of Claims, invoking its jurisdiction under *Judiciary and Judicial Procedure,* § 7, added by ch. 253, 67 Stat. 226 (1953) (now 28 U. S. C. § 1491 (1964)). He claimed that he secured good title to the two types of radar in issue by statute:

> "A . . . bill of sale . . . executed . . . on behalf of any executive agency purporting to transfer title . . . in surplus property under this title shall be conclusive evidence of compliance with the provisions

> of this title insofar as concerns title . . . of any bona fide . . . transferee for value and without notice of lack of such compliance." *Federal Property and Administrative Services Act of 1949*, § 203(d), 63 Stat. 385, 386 (1949), 40 U. S. C. § 484(d) (1964).

and had secured good title to the accessory power supplies by virtue of state sales acts. He demanded just compensation for the seizure of his equipment under the Fifth Amendment to the Constitution, and, in the alternative, demanded contract damages arising out of receipts signed by the Navy. On both claims, he asserted that the fair value of the seized equipment was evidenced by the retail prices of the goods as he had advertised them for resale, prior to their seizure.

The government asserted that all the equipment seized from petitioner related to the National Defense under the *Espionage Act* that the *Espionage Act* made it unlawful for the petitioner to retain the equipment, and therefore, since he had no right to retain it, he was entitled to no compensation for its seizure. The pertinent provisions of the *Espionage Act* read, at time of the seizure:

> ". . . Whoever, lawfully or unlawfully having possession of, access to, control over, . . . any document . . . instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." *Espionage Act*, § 793, added by ch. 645, 62 Stat. 737 (1948) (now 18 U. S. C. § 793(d), (e) (1964)).

It is also asserted that the goods petitioner had purchased from the Air Force were subject to the so-called "Use Warranty" which limited petitioner's right to recovery.

In 1960, petitioner moved for summary judgment on all issues except damages, and the government cross-moved for complete summary judgment.

The Court of Claims denied both motions. (App. 1b-6b) It held that, if the goods related to the National Defense under the *Espionage Act,* petitioner's title to them "was completely vulnerable" and, analogizing his possession to possession of narcotics, the Court stated ". . . . the possessor is not entitled to compensation for their loss, unless a statute provides for compensation." (App. 5b-6b) Notwithstanding, the Court of Claims stated petitioner ought to secure ". . . . a refund of his direct out-of-pocket expenditures in the above abortive transaction." (App. 6b)

The Court of Claims then directed trial before a Commissioner of the issue of whether the goods related to the National Defense and, subsequently, the amount of damages petitioner was entitled to recover if the Court decided he was entitled to recover.

Trial was had before a Commissioner who found that the goods related to the National Defense under the *Espionage Act,* both because they were the subjects of proper security classifications at the time of their seizure and because they were components of the Bat and Pelican missiles, whether properly classified or not.

On petitioner's exceptions to the Commissioner's findings, the Court of Claims reviewed them and, in large measure, adopted those findings as its own. (App. 1a-33a) It entered judgment in favor of petitioner for limited out-of-pocket expenses, but denied petitioner the right to recover the fair value of the seized equipments.

Reasons For Writ

The decision of the Court of Claims presents an important question of Federal law which has not been, but should be, settled by this Court as to the measure of damages recoverable by a party innocently purchasing surplus

property under the *Federal Property and Administrative Services Act of 1949*, which is thereafter seized by the government because it relates to the National Defense under the *Espionage Act*.

Moreover, it raises the question of whether plaintiff was deprived of just compensation by the Court's refusal to grant him the fair value of the seized property. The decision of the Court of Claims conflicts with the Congressional policy of establishing an economical and efficient system of disposing of government property sold as surplus property embodied in the *Federal Property and Administrative Services Act of 1949*, 63 Stat. 377 (1949), 40 U. S. C. § 471 (1964). If allowed to stand, it will severely curtail the government's receipts on future sales of surplus property. With the conclusion of the War in Viet Nam, the government will have to offer thousands of items of surplus military equipment for sale. No one will bid more than a pittance for these items because, under the Court of Claims decision at bar, no one can know whether any particular item of military equipment he purchases relates to or will be unilaterally claimed so to relate to the National Defense by some other branch of the Government, and on seizure thereof he will be limited to recovery of only his direct out-of-pocket expenses regardless of the fair value of the equipment.

The Federal Property and Administrative Services Act of 1949 directs that a Federal Agency can declare government property as surplus only after the head of the agency determines that it is neither required for the needs of the agency nor for the discharge of its responsibilities, *Federal Property and Administrative Services Act of 1949*, § 3(e), 63 Stat. 378 (1949), 40 U. S. C. § 472(e) (1964) and after an Administrator determines that it is not required for the needs and discharge of responsibilities of all other Federal Agencies. *Federal Property and Administrative Services Act of 1949*, § 3(g), 63 Stat. 379 (1949), 40 U. S. C. § 472(g) (1964).

This was done here. (Fn. 6; App. 11a-12a)

Of course, when the Air Force thereafter sold two types of radar to petitioner, concededly an innocent purchaser, under a bill of sale he received good title to the equipment under the Act:

> "A . . . bill of sale . . . executed . . . on behalf of any executive agency purporting to transfer title . . . in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title . . . of any bona fide . . . transferee for value and without notice of lack of such compliance." *Federal Property and Administrative Services Act of 1949*, § 203(d), 63 Stat. 385, 386 (1949), 40 U. S. C. § 484(d) (1964).

He also received good title to the accessory power supplies purchased from private parties, as a matter of state law.

The Court of Claims therefore erred when it held that because of the provisions of the *Espionage Act*, plaintiff's title was "completely vulnerable" and that petitioner, whose goods were seized ". . . is not entitled to compensation for their loss." (App. 5b-6b).

It is interesting to speculate but, for the purposes of this petition, irrelevant whether a mistake was made by the Air Force or by the Navy, or whether the goods related to the National Defense because they were the subject of a properly applied security classification or for other reasons. (See Concurring Opinion of Judge Davis, App. 8a-9a.) Prior to the seizure the petitioner had no knowledge of these matters, and any actions taken or not taken by any agency of the government prior to seizure were done or omitted without his fault.

The government, because it is the sovereign, had the power to seize the goods, but its reasons and authority for making the seizure should not serve to limit petitioner's right to just compensation. The Fifth Amendment con-

tains no proviso giving the government the right to take private property for public use without just compensation whether the property relates to the National Defense or otherwise. Yet the Court of Claims held here, both with respect to the property petitioner purchased from the Air Force and that which he purchased from private parties, that he was not entitled to just compensation for the taking, contrary to prior decisions of this Court:

> "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U. S. 40, 49 (1960).

Furthermore, the holding of the Court of Claims was in conflict with its own earlier decision in *Turney* v. *United States,* 115 F. Supp. 457 (Ct. Cl. 1953), which it attempted to distinguish on the erroneous ground that there was no *Espionage Act* in effect at the time of *Turney,* even though that statute had been in effect in all material respects since 1917. (App. 5b)

It is true that having denied petitioner any right to compensation for this taking, the Court of Claims did then decide petitioner had an "urgent equity" in getting back his direct out-of-pocket expenses (App. 6b), but while this is some compensation, it is not "just compensation." *United States* v. *Miller,* 317 U. S. 369 (1943).

Petitioner should have the right to prove the fair value of the seized property and should not be limited in his right to damages by a contrived ruling that his title to his goods was destroyed by the *Espionage Act,* so that "private property" referred to in the Fifth Amendment was not seized. The fact that the government has thrown petitioner the bone of his direct out-of-pocket expense as so much largesse, should not bar petitioner from receiving the full and proper measure of damages provided for by the Constitution of "just compensation."

The "use warranty" clause of the Air Force contract was inapplicable; as pointed out by Judge Davis, it was implicitly decided by the Court of Claims on the summary judgment motion that if the equipment did *not* relate to the National Defense, plaintiff could recover market value and not merely out-of-pocket expenditures notwithstanding that clause. (App. 9a) (Of course, the clause did not affect the accessory equipment petitioner purchased from private parties.)

Really, Judge Davis did not go far enough. For it is petitioner's contention, and this Court should so rule, that the measure of damages should be the same whether the goods related to the National Defense or not, since petitioner had no knowledge of such status. The measure of "just compensation" should not depend on a fortuitous circumstance of internal procedures by the military services.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. BURKE,
J. FREDERIC TAYLOR,
Attorneys for petitioner.

Of Counsel:
GEORGE HARRIS
FRANK X. O'DONNELL, JR.
BURKE & BURKE